STATE OF MICHIGAN

COURT OF APPEALS

SECURITY FIRST ASSOCIATED AGENCY, INC.,

Plaintiff/Counter-Defendant-Appellee,

v

DIANE METHNER,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 2, 2007

No. 270367
Genesee Circuit Court
LC No. 03-075406-CZ

DIANE METHNER,

Plaintiff-Appellant,

v

BROOK SMITH,

Defendant-Appellee.

No. 270368
Genesee Circuit Court
LC No. 03-075701-CZ

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

In Docket No. 270367, defendant/counter-plaintiff, Dianne Methner, appeals as of right an order denying case evaluation sanctions and costs against plaintiff/counter-defendant, Security First Associated Agency, Inc. ("Security"). In Docket No. 270368, plaintiff, Dianne Methner, appeals as of right an order denying case evaluation sanctions and costs against defendant, Brook Smith.[1] This Court consolidated Methner's appeals on May 31, 2006. *Security First Associated Agency, Inc v Methner; Methner v Smith*, unpublished order of the Court of

[1] The trial court entered a single order denying Methner's motion for sanctions.

Appeals, entered May 31, 2006 (Docket Nos. 270367 and 270368). We affirm the trial court's April 19, 2006, order denying Methner's motion for sanctions against Security and Smith.

I. Procedural History

On January 10, 2003, Security, Methner's former employer, filed a complaint against Methner seeking damages and injunctive relief for breach of contract and tortious interference with a business relationship. On February 14, 2003, Methner filed an answer and counter complaint seeking damages and injunctive relief for tortious interference with a business relationship, defamation, civil conspiracy and intentional infliction of emotional distress. On February 21, 2003, Methner filed a complaint against Smith, an account representative for Security, alleging the same claims she alleged against Security.

On February 27, 2003, Methner filed a motion to consolidate, arguing that common questions of law and fact existed in both cases because Security, as Smith's former employer, was responsible for Smith's defamation against Methner. Although Smith responded that consolidation was inappropriate because she was not subject to the arbitration agreement between Methner and Security, Smith stated that she would agree to consolidation if Methner would agree to arbitrate the case against her. After holding a hearing, the trial court entered an order consolidating the cases "for discovery purposes," and further providing that "the court shall reserve its ruling on whether the cases should be consolidated for trial." On April 25, 2003, just four days after entry of the consolidation order, the trial court issued scheduling orders in both cases, setting identical deadlines in both cases for filing witness lists, discovery cut-off, dispositive motions, case evaluation and trial.[2]

On August 4, 2003, Methner, Smith and Security were directed to appear for case evaluation before the same case evaluation panel. On the case evaluation form in case number 03-075406, the panel awarded Security $2,500 from Methner,[3] and awarded Methner $2,500 from Security and Smith "jointly and severally." The case evaluation form for case number 03-075701 contained no award, but merely the panel's reference to the other award. Security and Smith each filed a conditional acceptance of the case evaluation awards conditioned on Methner's acceptance of the awards. Methner rejected both awards by failing to file a response.[4] On July 12, 2005, the cases proceeded to trial before the same jury. On July 15, 2005, the jury rendered its verdict, finding in favor of Methner regarding her tortious interference claims against Security and Smith and her defamation claim against Smith. Methner was awarded $2,500 plus costs and interest against Security and $50,000 plus costs and interest against Smith.

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[2] Actually, two scheduling orders were issued, one for each case, though each order had both case captions.

[3] On January 5, 2004, the trial court entered an order dismissing Security's claims against Methner.

[4] There is no evidence that Methner objected at any time prior to the conclusion of trial to the consolidated case evaluation awards, appellees' conditional acceptances of the case evaluation awards, or to the earlier scheduling order giving both cases the same dates for all case events.

Smith subsequently filed a motion for remittiur, which was granted, reducing the judgment against her to $10,000.

On December 7, 2005, Methner filed a motion for case evaluation sanctions and attorney fees, arguing that sanctions were appropriate pursuant to MCR 2.403(O)(3) because Security's and Smith's conditional acceptances of the case evaluation awards were improper, and thus, should be considered rejections of the case evaluation awards. After hearing the parties arguments, the trial court noted that "substance should control over form," and held that given how the cases had been handled together, it was appropriate for Security and Smith to make multi-party conditional acceptances to the case evaluation awards.

> As I look at this case in the way it came to me and the way it was resolved by trial, I do think it is appropriate to consider it as a multiparty case, and under MCR 2.403(L)(3)(b) I think the response given by Security First and Brook Smith to the awards is justified, that you can intend the acceptance to be effective only if all opposing parties accept. So, I am going to deny the request for sanctions.

On April 19, 2006, the trial court entered an order denying Methner's motion for sanctions. Methner appeals this order as of right.

II. Analysis

Methner argues that the trial court erred when it denied her motion for sanctions. A trial court's ultimate decision to grant or deny a motion for case evaluation sanctions involves a question of law, which we review de novo. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000).

MCR 2.403(L)(1) provides:

> Each party shall file a written acceptance or rejection of the panel's evaluation with the ADR clerk within 28 days after service of the panel's evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

A response to a case evaluation award that is not permitted or in conformity with the court rules is deemed a rejection. *Bush v Mobil Oil Corp*, 223 Mich App 222, 227; 565 NW2d 921 (1997), overruled on other grounds by *CAM Const v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002). MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

Methner argues that because appellees' conditional acceptances were not permitted or in conformity with the court rules, and because she subsequently received a verdict more favorable

than the case evaluation awards, she is entitled to sanctions. Appellees argue that Methner is not entitled to sanctions because they filed proper conditional acceptances under MCR 2.403(L)(3)(b), which given Methner's subsequent rejection, did not act as rejections of the case evaluation awards for purposes of the cost provisions of MCR 2.403(O).[5] MCR 2.403(L)(3)(b) provides:

> (3) In case evaluations involving multiple parties the following rules apply:
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> * * *
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> (b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if
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> (i) all opposing parties accept, and/or
>
> (ii) the opposing parties accept as to specified coparties.

Here, all parties were directed to appear for case evaluation before the same case evaluation panel. The parties, and in particular Methner, treated the evaluation as if it were one case with multiple parties. Methner, in fact, noted in her summary that she asserted a "counter-claim" against Smith (and Security) and requested that the panel award her "damages on her counter-complaint." The evaluation panel, in one case only, subsequently awarded Security $2,500 from Methner and awarded Methner $2,500 from Smith and Security "jointly and severally." Since the case evaluators treated the cases as one case involving multiple parties, and because under MCR 2.403(L)(1) each party must accept or reject *the panel's evaluation*, appellees properly exercised their respective rights to accept the case evaluation awards conditioned on Methner's acceptance of the awards. MCR 2.403(L)(3)(b). In other words, absent a motion from one of the parties objecting to the form of the evaluation, the parties were required to accept or reject the evaluation given by the panel. Appellees' did so. Accordingly, the trial court did not commit error when it denied Methner's motion for sanctions. MCR 2.403(L)(3)(b) and (c); MCR 2.403(O)(1); *Dykes v William Beaumont Hospital*, 246 Mich App 471, 484-485; 633 NW2d 440 (2001).

Moreover, given Methner's decision to forego objecting to the case evaluators' decision to treat the case as one case with multiple parties, we find that Methner is precluded from now arguing that the form of the case evaluation awards was improper because it treated separate cases as one consolidated case with multiple parties. A "party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp &*

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[5] For purposes of the cost provisions of MCR 2.403(O), pursuant to MCR 2.403(L)(3)(c), "a party who makes a limited acceptance of an award [pursuant to MCR 2.403(L)(3)(b)] is deemed to have rejected it only with respect to those opposing parties who accepted, but not with respect to those who rejected, the award." *Dykes v William Beaumont Hospital*, 246 Mich App 471, 484-485; 633 NW2d 440 (2001).

Medical Center Corp, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray